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No. 08-1022

IN THE

Supreme Court of the United States

VENTAS FINANCE I LLC
Petitioner,

v.

CALIFORNIA FRANCHISE TAX BOARD
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Council on State Taxation ("COST") respectfully requests leave to file a Brief *Amicus Curiae* in support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1. Counsel for Petitioners has consented to COST's filing of an *amicus* brief. Despite COST'S qualifications to submit an *amicus* brief, Counsel for Respondents has refused to consent to the filing of such a brief. There are distinct two reasons why COST should be allowed to file as an *amicus* in this case.

First, with respect to the Petition filed in this case, COST makes additional observations concerning the constitutional implications of the remedy afforded by the Franchise Tax Board after finding the underlying tax unconstitutional. A full exposition of the constitutional controversies stemming from this case by all interested and eligible amicus is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, COST members have a compelling interest in the Due Process issues presented by this case. COST and its members are uniquely familiar with the potential effect of the California Appellate Court's decision on state tax litigation beyond the borders of California.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief amicus curiae in support of Petitioner ("Ventas") is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade asso-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file this brief. Petitioner has consented to the filing of this brief and their letter has been filed with the Clerk of this Court. Respondent has denied consent.

ciation formed in 1969 to promote equitable and non-discriminatory state and local taxation of multi-jurisdictional business entities. COST represents more than 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state, including companies from every industry segment. COST members have an interest in the appropriate remedy for a taxpayer forced to pay an unconstitutional tax.

COST's primary objectives are to strike down unconstitutional taxation and support taxpayer attempts to obtain appropriate remedies for discriminatory taxes. Multi-jurisdictional entities are particularly susceptible to the threat of unconstitutional taxation because they are present in large numbers of taxing jurisdictions and often lack sufficient political clout in each of them to protect themselves from discriminatory taxation through the political process. When a tax is recognized by the courts as unconstitutional, that decision is rendered meaningless unless it is matched with a constitutionally sufficient remedy. A proper remedy is critical to make the taxpayer whole, but it is also critical that appropriate incentives exist to help prevent unconstitutional taxation in the first instance. COST submits this brief in support of the Petition because the important constitutional issues raised by this case affect all COST member companies.

SUMMARY OF THE ARGUMENT

The finding of the California Court of Appeal fails to satisfy the minimum federal due process requirement of a "clear and certain" remedy that this Court recognized in *McKesson Corp. v. Div. of Alcoholic Beverages*, 496 U.S. 18 (1990). Both the Court of Appeal and the trial court found that the LLC tax statute

unconstitutionally taxed all income without apportionment, and both the Court of Appeal and trial court appropriately concluded that the statute could not be "saved" by judicial reformation to add an apportionment scheme because the legislature intentionally did not include an apportionment scheme. The trial court properly recognized that because the statute was void, California was required to refund all taxes paid under the authority of the statute. By contrast, without citing any authority for its decision, the Court of Appeal allowed only a partial refund of the tax paid based on an apportionment formula the Legislature had expressly considered and unequivocally rejected. The court reasoned that it found no other principle of state law or federal or state due process requiring it to provide Ventas the full refund.

The Supreme Court should review this case for two reasons. First, the holding below represents the classic "bait and switch" that this Court specifically prohibited in *Reich v. Collins*, 513 U.S. 106 (1994). California "baited" Ventas to first prepay the tax with the promise of a remedy for an unconstitutional statute based on either judicial reformation of the statute or invalidation of the statute. Then the court "switched" the remedy in mid-course to a new remedy based neither on judicial reformation nor invalidation of the unconstitutional statute. Instead, the lower court created a new remedy, holding that the State need refund only the difference between the tax originally paid and the amount the State could have constitutionally taxed, rewriting the LLC tax statute, presumably to suit what it believed were superior policy objectives.

Second, absent review by this Court, other courts will follow California's lead-limiting remedies for un-

constitutional taxes to only the bare minimum—even if that requires a court to rewrite the tax statute in question. If courts are permitted to ignore settled remedies for constitutional taxes and invent new remedies from whole cloth at the conclusion of litigation, state and local governments will recognize that there are no negative consequences of enacting an unconstitutional tax from the onset. In turn, states and local governments will conclude that the threat of review by this Court is insufficient for them to refrain from adopting unconstitutional tax schemes. To preserve due process rights of taxpayers nationwide, this case must be reviewed.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROHIBITS A TAXING JURISDICTION FROM CHANGING THE NATURE OF A REMEDY DURING LITIGATION THAT RESULTS IN AN IMPERMISSIBLE "BAIT AND SWITCH."

Review by this court is necessary to ensure proper application of the federal constitutional requirements for refunding discriminatory taxes. In *McKesson*, the U.S. Supreme Court held that states have some choice in their form of refund relief they provide so long as it complies with minimum federal due process requirements. Specifically, the *McKesson* Court held that when a tax is found to discriminate against interstate commerce, the Due Process Clause obligates the taxing authority to provide "meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31.

If a state requires a taxpayer to remit its liability before obtaining review of the validity of a specific tax, minimum federal constitutional requirements

are met only if the state later provides taxpayers with a "clear and certain remedy" for any tax subsequently determined to be "erroneous or unlawful." *McKesson*, 496 U.S. at 20. This Court has further interpreted McKesson's "clear and certain" remedy requirement as applied to reformulated tax systems in two notable decisions, *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998) and *Reich*, 513 U.S. at 106. Each of these decisions has been expunged by the California Court of Appeal's stance in the present case.

In *Reich*, the Supreme court relied on the "clear and certain" remedy requirement in *McKesson* in awarding a full refund to taxpayers assessed under an unconstitutional Georgia statute exempting from tax retirement benefits paid by the state, but not retirement benefits paid by the federal government or private employers. The Court prevented Georgia from unfairly reconstructing its tax scheme in "midcourse" resulting in a "bait and switch." *Reich*, 513 U.S. at 110-111. Georgia's "clear and certain" remedy was a refund statute (the bait) but after the taxpayers filed for relief the state claimed that no refund or such remedy existed (the switch). *Id.* at 111.

Shortly after Reich was decided, this Court issued a summary reversal of Florida's refusal to fully refund an unconstitutional tax. *Newsweek*, 522 U.S. at 442. In *Newsweek*, a magazine publisher sought a refund of sales taxes paid under an unconstitutional taxing regime. The Department of Revenue subsequently denied the refund request by arguing that Newsweek's remedy lay in a prepayment tax challenge, of which it failed to take advantage. Though states have the "flexibility to maintain an exclusively predeprivation remedial scheme, so long as that

scheme is 'clear and certain'," due process prevents the state from applying this sole remedy to taxpayers who relied on the apparent availability of a post-payment refund when paying the tax. *Newsweek*, 522 U.S. at 444 (quoting *Reich*, 513 U.S. at 110-11). Therefore, once a State has established a remedial scheme for the refund of unconstitutional taxes, due process mandates that a taxpayer is entitled to the remedy dictated by that scheme.

As noted, under California law, the established remedy for an unconstitutional statute was judicial reformation (*i.e.*, curing the constitutional defect) or invalidation of the statute if it could not be reformed. However, the Court of Appeal ignored this established remedy and, without citing any authority, fashioned a new remedy out of whole cloth. The only explanation the lower court offered was that it knew of "no other principle of state law or state or federal due process that would entitle [petitioner] to a full [refund]." *Ventas Finance I, LLC v. Franchise Tax Board*, 81 Cal. Rptr. 3d 823, 844 (Cal. Ct. App. 2008). Now, the California Supreme Court's lack of review puts the matter squarely with this Court to decide whether to provide the taxpayer with the due process protections afforded by the U.S. Constitution.

A. California "Baited" Ventas With The Remedy Providing for Refund of Unconstitutional Taxes.

Ventas took the "bait" offered by California's settled law governing remedies for unconstitutional taxes, and paid the unapportioned LLC tax before challenging its constitutionality. Specifically, California law provides for a postpayment refund of taxes later deemed void. Cal. Rev. & Tax. Code § 19382: "[A]fter payment and denial by the Franchise Tax

Board of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring an action, upon the grounds set forth in that claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid." *Id.* In addition, when a statute is held unconstitutional, California law also allows a court to "save" a State tax statute that would be deemed unconstitutional by reforming the statute when it can be done in a manner consistent with legislative policy and intent. *Ceridian Corp v. Franchise Tax Board*, 102 Cal. Rptr. 2d 611, 621 (Cal. Ct. App. 2000). These requirements protect the taxpayer by prescribing the remedy that may be sought when a tax is suspect as unconstitutional, and also ensure that the courts do not engage in inappropriate judicial policymaking.

Indeed, here both the Court of Appeal and the trial court agreed that the LLC tax violated the Commerce Clause because it was not apportioned. Both courts also properly determined that adding an apportionment scheme was not an appropriate mechanism because reformation of the statute would be inconsistent with legislative intent; the legislature specifically considered and rejected the exact apportionment scheme that the Franchise Tax Board had suggested. Given that the LLC tax statute could not be judicially reformed, the trial court properly concluded that California's settled remedy for unconstitutional taxes required invalidation of the statute and the consequent refund of all amounts paid under such statute. However, the Court of Appeal refused to follow this settled law; hence, the "switch" was on.

B. California "Switched" The Remedy in Mid-Course.

After Ventas took the "bait," the Court of Appeal "switched" the available remedy. Rather than following the settled state law remedy that, under the circumstances, would have required invalidation of the unconstitutional LLC tax and therefore a full refund of all amounts paid by Ventas under the statute, the court determined that the State need only provide "a refund of the difference between the levy actually paid and the amount that could be collected without violating the Commerce Clause using a proper method of apportionment." *Ventas*, 81 Cal. Rptr. 3d 823, 844 (Cal. Ct. App. 2008). The lower court justified the new remedy merely on the basis that it could find "no other principle of state law or state or federal due process that would entitle [petitioner] to a full [refund]." *Id.*

In ignoring its own conclusion that the statute could not be judicially reformed to cure the unconstitutionality, and in declining to invalidate the statute entirely, California's lower court performed just the "switch" that this Court's precedents condemn.

II. REVIEW OF THE QUESTIONS PRESENTED WILL HAVE RAMIFICATIONS IN MANY STATES

This Petition should be granted because the remedies for unconstitutional taxes are vitally important to sound tax administration and represent a recurring issue across the country. The question of an appropriate remedy routinely arises in state tax issues and remains a contentious issue. The lower court opinion in this case stripped Petitioner of any meaningful opportunity to challenge the unconstitutional

tax and removed any penalty to the State by having enacted an unconstitutional tax, thereby eliminating any real disincentive to enact an unconstitutional tax in the first instance.

If a state can ignore promised remedies for unconstitutional taxes and impose a new remedy at the 11th hour of a constitutional challenge, taxpayers like Ventas will be dragged through costly and time-consuming litigation, only to find they have no remedy for the constitutional violation they suffered. The ability for taxpayers to obtain a timely and satisfactory remedy for an unconstitutional tax is a nationally recurring problem that can only be exacerbated by the lower court's decision in this case. For example, Alabama taxpayers continue to be stonewalled by the state in their attempts to obtain refunds for a tax that this Court declared unconstitutional in 1999. *See South Central Bell Telephone Company v. State*, 526 U.S. 160 (1999) (holding that the Alabama franchise tax violated the Commerce and Equal Protection Clauses); *Ex parte G. Thomas Surtees, as Comm'r of the Ala. Dept. of Rev.*, No. CV-01-1106, 2008 WL 4369259 (Ala. Sept. 26, 2008) (ruling on issues faced by foreign corporations still seeking refunds of the unconstitutional franchise tax paid prior to 1999). Similarly, Kentucky—through judicial, legislative, and administrative actions—continues to deny all refund claims relating to a tax position the Kentucky Supreme Court struck down in 1994. *See Johnson Controls, Inc., et al., v. Kentucky*, No. 3:07-CV-65-KKC, 2008 WL 594467 (E.D. Ky. Feb. 29, 2008) (describing the 14-year struggle taxpayers have faced to seek a remedy for overpayment of corporate income tax). The remedy situation in Kentucky has become so dire that taxpayers now seek redress in federal court. The Alabama and Kentucky examples

demonstrate that strong, preemptive action is needed from this Court in order to dissuade states from adopting procedures that perpetually deny taxpayers a fair review.

Faced with these realities, taxpayers will simply submit to unconstitutional taxes rather than challenge them. Without the threat of legal challenges and the possibility of issuing refunds, state and local governments will lack any disincentive to enact unconstitutional taxes. To ensure that protections from unconstitutional taxes are meaningful, this Court should not permit the bait and switch performed by California in this case. This Court must review the decision below to make clear the process due taxpayers who challenge unconstitutional taxes.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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